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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ANTHONY W. CZARNIK, Plaintiff and Respondent, v. ILLUMINA, INC., Defendant and Appellant.	D041034 (Super. Ct. No. GIC763972)

APPEAL from a judgment and postjudgment orders of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed as modified.

Illumina, Inc. (Illumina) appeals a $7.5-plus million judgment entered in an employment action by Anthony W. Czarnik against it for disability discrimination and retaliation in violation of the California Fair Employment and Housing Act (Gov. Code, § 12900 et. seq (FEHA)) and wrongful discharge in violation of public policy, and certain postjudgment orders relating thereto. Illumina contends that we must reverse the judgment because (1) the trial court erroneously excluded evidence of a transcription of notes from

group therapy sessions in which Czarnik participated during his employment; (2) the court erred in instructing the jury regarding causation; (3) there was insufficient evidence to support the judgment; and (4) the compensatory and punitive damages awards were excessive. We find that the $5 million punitive damage award was "grossly excessive" in accordance with federal constitutional principles and modify the judgment to reduce that award to $2,196,935. Otherwise, we reject Illumina's arguments and affirm the judgment and orders.

FACTUAL AND PROCEDURAL BACKGROUND

Czarnik holds a bachelor of science and a master's degree in biochemistry and a Ph.D. in chemistry. From 1983 to 1993, Czarnik taught at Ohio State University (Ohio State) and during that time he became tenured as a professor of chemistry. While working for Ohio State, Czarnik received a number of awards for his work in organic synthesis and wrote approximately 40 grant applications for research projects with which he was involved. During that time, Czarnik was diagnosed with severe clinical depression resulting from a genetic problem that causes an imbalance in his brain chemicals. His depression is classified as a "mental illness" and when suffering from it, Czarnik typically experiences lack of self-esteem, lack of focus and an inability to sleep. Czarnik takes two anti-depressant medications to minimize his illness.

After leaving Ohio State in 1993, Czarnik began working in the private sector on bio-organic chemistry and combinatorial chemistry. During this time, Czarnik wrote, lectured and sat on the boards of major scientific journals in his areas of study and patented a number

of his scientific discoveries. Czarnik became well known for his contributions in the areas of combinatorial chemistry, chemosensors and fluorescence.

In the spring of 1998, Czarnik joined John Stuelpnagel and Mark Chee as the founding managers of a company that later became Illumina, the business of which was to develop commercial applications for promising micro array technology developed by Dr. David Walt of Tufts University. Stuelpnagel was the company's Chief Executive Officer, Chee was its Vice President of Genomics and Czarnik was its Chief Scientific Officer (CSO).

Czarnik was Illumina's most highly compensated employee, with a gross monthly salary of $15,417. He also received a $10,000 signing bonus and the right to purchase 400,000 shares of common stock in the company for a penny a share, vesting over a five-year period, subject to the company's right to repurchase unvested shares if Czarnik left the company before that period expired. Pursuant to Czarnik's employment agreement, his principal responsibilities as the CSO included: identifying and acquiring the technologies necessary to launch the company; identifying principal applications for the technology; working with his co-founders to recruit the core scientific and management team; managing the research and development group and providing technical leadership; participating in the creation of the company's intellectual property portfolio; and participating in strategic corporate planning. The agreement provided that the company would acknowledge Czarnik's role as one of its founders in public disclosures.

During the initial stages of the company development, Czarnik, Stuelpnagel and Chee considered various potential scientific applications of the Walt technology and ultimately decided to focus the company's first efforts on genomics. The men formulated a business

plan, raised $9 million in funding, recruited scientific staff to support the company's research and development efforts and connected with other companies regarding potential business collaborations. They each put in many hours, often working from 8:00 a.m. to 7:00 p.m. during the work week. Czarnik was personally involved in recruiting the first two scientists and the first engineer Illumina ultimately hired and was instrumental in promoting Illumina's work in scientific publications.

Notwithstanding the tremendous effort Stuelpnagel, Chee, Czarnik and others were making, by late 1998, Stuelpnagel became concerned that Illumina was not achieving the research goals initially set for it and that its management was not working well as a team. In November, Stuelpnagel raised his concerns with Czarnik that the research efforts were not progressing rapidly enough, although he remained "confident" that he had hired the right managers.

During the same period, Czarnik began to experience depressive symptoms resulting from an earlier change in one of his anti-depressant medications that was causing certain undesirable side effects. Czarnik's symptoms escalated, although because of the stigma attached to mental illness, he did not tell Stuelpnagel or Chee about his depression. In March 1999, Czarnik met with Chee to get a "reality check" on how he was performing. During the conversation, Czarnik suggested that he would step down as the CSO if Chee wanted the position and felt that the change would benefit the company. Chee told Czarnik to stay in the position, that everyone had high hopes that the chemistry group would eventually make a big contribution to Illumina's business.

By early April 1999, when Czarnik was working on an application to the National Institute of Standards and Technology for a $2 million grant, he was experiencing deep depression that interfered with his ability to write the grant. Czarnik concluded that he was not going to be able to complete the grant application by the deadline and decided to explain the situation to Stuelpnagel and Chee so that they could complete and submit the application in a timely fashion.

On April 6, Czarnik met with Stuelpnagel and Chee, but became emotional as he began his explanation and was only able to say that he was not feeling well and would not be able to write the grant. Stuelpnagel responded angrily, berating Czarnik for his inability to meet the application deadline. When Chee attempted to intervene, Stuelpnagel stopped him and continued to yell at Czarnik, saying that Czarnik had let the company down and suggesting that Czarnik had "flamed out" and should leave the company. Crying, Czarnik indicated that he wanted to stay with the company, but needed to go home to get better. Suspecting that Czarnik was suffering from a nervous breakdown, Stuelpnagel told Czarnik "you can't help Illumina in this state" and told Czarnik to go home and rest. After Czarnik left, Stuelpnagel and Chee spoke briefly about the encounter and their surprise at Czarnik's behavior.

The next day, Stuelpnagel called to see how Czarnik was doing and told Czarnik to take whatever time was necessary to recover. On April 8, Czarnik followed the advice of his brother, a physician, by taking an amphetamine to quickly overcome his depressive symptoms and immediately began to feel "good." Czarnik went into the office that day and met with Stuelpnagel and Illumina's vice president of operations; he explained his history of

depression and that he had suffered a depressive episode as a result of the change in his medication. Czarnik told them he was getting treatment and felt that he could finish writing the grant application, which he then did.

On April 11, Stuelpnagel and Chee discussed replacing Czarnik as the CSO based on their concern about his personal health; they agreed to monitor the situation to see whether the breakdown was an "isolated incident" or "would turn into a pattern . . . ." Thereafter, Illumina's senior management did not include Czarnik in important decision-making about fundraising, financing, company presentations, strategic planning, hiring and whether to take the company public. Czarnik also felt that Stuelpnagel avoided him.

In October 1999, Jay Flatley succeeded Stuelpnagel as Illumina's Chief Executive Officer. Czarnik had hoped that Flatley would give him a fresh start with company management, but Flatley showed no interest in getting to know him, understanding his function at the company or including him in projects that specifically fell within his expertise and work responsibilities. Czarnik never told Flatley about his illness, although Flatley was apparently aware of it.

By January 2000, Flatley felt that Czarnik was a "potential serious problem" for the company. Thereafter he concluded that he needed to replace Czarnik as the CSO and stopped relying on Czarnik to carry out the CSO's responsibilities. During the same time period, Czarnik approached Flatley and indicated his willingness to step down from the CSO position to the vice president of chemistry if Flatley wanted to bring someone else in to his current position.

In February 2000, Walt, who was on Illumina's board, met Czarnik for breakfast and expressed concern about whether Czarnik's enthusiasm for the company was waning. A week later, Flatley and Czarnik met for dinner and Flatley inquired whether Czarnik was still willing to step down as the CSO and become a research fellow, which was a non-managerial role, for the company. At that time, Flatley told Czarnik he would involve Czarnik in the search for a new CSO, but failed to mention that the company's search efforts were already on-going and that he had identified David Barker as a potential candidate for the position.

On March 1, 2000, Flatley removed Czarnik from the CSO position and told Czarnik the company would be reducing his salary and repurchasing a large portion of his Illumina stock. Very shortly thereafter, the company hired David Barker to replace Czarnik as the CSO and in mid-March Flatley asked Czarnik to sign a new employment contract that included a $20,000 reduction in Czarnik's salary and a repurchase of 167,000 in Illumina shares. Knowing that the company could not repurchase Czarnik's stock without Czarnik's consent, Flatley told Czarnik "[y]ou better take this because I'm doing you a big favor, and if you don't take this, life is going to be tough for you in the future." Czarnik refused to sign the proposed contract.

In late March, Czarnik told Flatley that he was willing to resign from the company if Illumina would agree to pay him one year of salary and to allow him to keep all of his Illumina stock. Flatley rejected Czarnik's proposal, but was willing to negotiate with Czarnik about his possible severance from the company. While the men were in the midst of negotiations, Czarnik discovered that Illumina's S-1 filing with the Securities and Exchange Commission in connection with the planned initial public offering (IPO) of the company's

stock omitted any discussion of his role in the development of its technology. On April 5, Czarnik sent Flatley an e-mail in which he asserted that Flatley's attempts to reduce his salary, take away his stock options and omit him from the company history were "discriminatory and punitive," based on his illness, and that if he resigned it would not be voluntary.

In late April 2000, Illumina's board of directors discussed Czarnik's severance from the company and agreed to offer Czarnik a proposed severance package that included nine months' salary and nine months' stock vesting. Walt, who was a friend of Czarnik's, agreed to talk to Czarnik about the proposal. He tried to convince Czarnik to accept the offer, indicating that Flatley planned to set performance goals that Czarnik could not meet, but Czarnik rejected it.

On May 4, 2000, Flatley told Czarnik that he planned to change Czarnik's performance goals and that henceforth Czarnik would be reporting to him rather than to Barker. Flatley also gave Czarnik a counseling memo regarding problems with his performance. Two weeks later, Czarnik filed a complaint with the California Department of Fair Employment and Housing (the DFEH), alleging that Illumina had discriminated against him because of his disability and had punished him for complaining about the discriminatory treatment. At approximately the same time, Flatley began to consider whether to terminate Czarnik's employment.

On May 19, Flatley gave Czarnik a new set of 90-day performance goals. Flatley admitted at trial that the goals were "aggressive," although in fact they were unattainable because they required Czarnik to accomplish more than Illumina's staff had achieved since

the inception of the company and because Illumina lacked certain technology that would have facilitated the accomplishment of those goals until shortly before Czarnik's termination. Although Illumina received a formal notification from the DFEH about Czarnik's claim and prepared a formal response to the claim, it did nothing to investigate Czarnik's allegations, in contravention of its personnel policies.

In July 2000, Flatley, Stuelpnagel and other company representatives made presentations to potential investors in cities across the country to promote the IPO of Illumina's stock. While the "road show" was on-going, Czarnik found out that there had been a possible mislabeling of the dyes Illumina used in its "768" decoding experiment and he told Chee, who was in charge of the office while the other managers were away, that he was concerned about the integrity of the results of the experiment, the "success" of which was a significant part of the IPO promotions, and that using the results to promote the IPO could constitute a fraud on investors. Czarnik continued to question the propriety of relying on the 768 decoding results to promote the company, but his objections fell on deaf ears.

On September 5, 2000, Flatley terminated Czarnik for not meeting performance goals and indicated that if Czarnik "[told] anyone outside of the company about the reagent [dye] problem, the company will go after you with everything it has." Illumina's human resources manager immediately escorted Czarnik out of the building. A week later, Czarnik received a $4,516.67 check from Illumina for the repurchase of Czarnik's unvested shares of company stock, which at the time had a fair market value of $10 million; Czarnik never cashed the check.

Czarnik filed this action in March 2001, contending that Illumina had wrongfully terminated him from his research fellow position. For the purposes of trial, the parties stipulated to Czarnik's mental illness and that neither party would call any experts regarding Czarnik's mental disability but that the parties could call Czarnik's treating psychiatrist, Dr. Allan Mallinger, to testify regarding his treatment of Czarnik or Czarnik's statements to him regarding the events at Illumina. They also stipulated that Czarnik was not seeking lost salary as part of his economic damages, but only lost stock value.

After a five week trial, the jury returned a verdict in Czarnik's favor on all of his claims, finding: (1) Illumina terminated his employment and took other adverse employment actions against him in whole or part because of his disability; (2) the company terminated Czarnik and took other adverse employment actions against him in whole or part because he complained about discrimination; (3) Czarnik had a reasonable belief that Illumina used or was planning to use the results of the 768 decoding experiment in a misleading manner in its presentations to potential investors and had raised his concerns to appropriate individuals at Illumina; (4) the decision-makers involved in Czarnik's termination were aware that Czarnik had raised concerns about the company's use of the 768 decoding experiment results and the termination was based in whole or part on that fact; (5) Illumina terminated Czarnik in whole or part because he raised concerns regarding the 768 experiment; and (6) Czarnik had suffered $2,196,935 in damages as a result of Illumina's misconduct. The jury also found that Illumina was motivated by malice, fraud and oppression and awarded Czarnik $5 million in punitive damages. After Illumina unsuccessfully sought judgment notwithstanding the

verdict and a new trial, the parties stipulated that Czarnik was entitled to recover $325,000 in attorney fees. Illumina appeals.

DISCUSSION

I. *Exclusion of Transcription of Group Therapy Notes*

At trial, Illumina tried to introduce a series of exhibits consisting of Dr. Mallinger's handwritten notes from individual therapy sessions he had with Czarnik from April to August 1999, a defense transcription of Dr. Mallinger's dictation about the handwritten notes and a defense transcription of Dr. Mallinger's dictation regarding Czarnik's statements during group therapy sessions Czarnik participated in from September 1999 to January 2001. After the court indicated it was not inclined to admit the handwritten notes or the transcriptions, which Dr. Mallinger apparently had not reviewed for accuracy, defense counsel argued that Dr. Mallinger's testimony "[would] not have the same force and effect as his live testimony coupled with the notes." The court held that, although Dr. Mallinger could use the notes to refresh his recollection and could read from the notes as to those matters, it would not admit the transcriptions or the handwritten notes because the documents contained extraneous and/or hearsay matters that might mislead the jury or be unduly prejudicial or that had already been ruled inadmissible.

In front of the jury, Dr. Mallinger testified extensively from his hand-written notes about Czarnik's individual therapy sessions from April to August 1999 and another session in July 2000. He also testified that the transcription of the group therapy notes did not refresh his recollection about Czarnik's statements during the group sessions, although he vaguely remembered Czarnik saying that he was in a "good legal position" and had "leverage against

the company." Czarnik also testified briefly about his sessions with Dr. Mallinger and a few statements he made during those sessions; on cross-examination, defense counsel asked Czarnik whether he remembered making various statements to Dr. Mallinger in the group sessions, but Czarnik testified that he either could not remember, or could not imagine, making such statements. Defense counsel did not at any point attempt to introduce the transcription of Dr. Mallinger's group therapy notes under the hearsay exception on which Illumina now relies (past recollection recorded) or for impeachment purposes.

Illumina challenges the exclusion of the transcription of Dr. Mallinger's group therapy notes on appeal and argues that our review of the trial court's ruling is de novo because the application of a hearsay exception is a question of law. However, the record establishes that the court did not hold the transcription inadmissible solely on hearsay grounds, but instead exercised its discretion to exclude the evidence pursuant to the standards of Evidence Code section 352. We review such a ruling for an abuse of discretion. (Evid. Code, § 352; *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 762; compare *Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 12-13 [reviewing de novo the trial court's overruling of a hearsay objection].)

We find no such abuse because, as noted above, Illumina did not authenticate the accuracy of the transcription, nor did it ask the court to admit the transcription pursuant to the past recollection recorded exception to the hearsay rule. Further, even if we were otherwise inclined to find that the exclusion of the evidence was an abuse of discretion, the error was not so prejudicial as to constitute a miscarriage of justice in light of Dr. Mallinger's testimony that he vaguely recalled Czarnik making damaging statements about being in a

"good legal position" and having "leverage against the company." (*Olson v. American Bankers Ins. Co.* (1994) 30 Cal.App.4th 816, 827.) The court's exclusion of the transcription thus did not constitute reversible error.

II. *Instructions and Special Verdict Form Relating to Causation*

Illumina challenges the causation instruction and the special verdict form relating to Czarnik's FEHA claim insofar as they specified that the jury had to find that discrimination was "a motivating factor" rather than a determinative factor underlying the adverse employment actions taken against Czarnik. However, as Illumina admits, it stipulated to the trial court's giving of the instruction and use of the special verdict form. Further, it did not raise the issue in its post-trial motions.

A party may waive its right to challenging an error by expressly or impliedly agreeing to the erroneous ruling or procedure. (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1687; compare *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [doctrine of invited error precludes a party from misleading the trial court and then profiting therefrom in the appellate court].) Illumina contends, however, that we should nonetheless decide the issue on its merits because public policy favors resolution of the error, which is perpetuated in the BAJI instructions.

Although an appellate court may consider a belatedly-raised issue of law involving a matter of important public interest or public policy, even where the complaining party took an inconsistent position in the trial court (see *Stevens v. Owens-Corning Fiberglass Corp.* (1996) 49 Cal.App.4th 1645, 1653), we perceive of no pressing public policy reason to justify deviating from the general rule of waiver here. Illumina agreed to the causation

instruction and the jury rendered its verdict based thereon. If employment discrimination claims are as prevalent as Illumina suggests, there will be numerous opportunities for defense lawyers to challenge defects in the causation instruction in a timely fashion. We decline to exercise our discretion to reach the issue in this case.

III. *Sufficiency of the Evidence*

Illumina challenges the sufficiency of the evidence to support the judgment in numerous respects. Czarnik contends that Illumina has waived its right to raise this challenge because its brief largely sets forth evidence favorable to it and ignores the evidence favoring the jury's findings.

Czarnik is correct that established rules of appellate practice require an appellant who challenges the sufficiency of the evidence to set forth all material evidence on the point rather than merely evidence supporting its view of the case and that an appellant who fails to comply with this rule may be deemed to have waived the alleged deficiencies. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317.) However, although Illumina's description of the evidence in its brief is not quite as forthcoming as it could be, we do not find the description to be so wanting as to justify a finding of waiver.

On the merits, Illumina argues that there is insufficient evidence to support the jury's findings of discrimination, retaliatory termination or termination in violation of public policy. In reviewing these challenges, we must view the evidence in the light most favorable to the judgment and resolve evidentiary conflicts and indulge all reasonable inferences possible to uphold the jury's verdict. (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.) Even if we

were to conclude that the circumstantial evidence could reasonably be reconciled with a contrary conclusion, this alone does not warrant interference with the determination of the trier of fact. (*People v. Farnam* (2002) 28 Cal.4th 107, 143.) Because we find that there is substantial evidence in the record to support the discrimination theory underlying the compensatory damage award, we do not reach the issue of whether there was also sufficient evidence to support the alternative theories of retaliation and whistle blowing underlying that same award. (See *Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 969, and cases cited therein.)

Illumina contends that there was no credible evidence to establish that it terminated Czarnik because of his depression. However, in most employment discrimination cases, direct evidence of intentional discrimination is rare and the plaintiff must prove his or her claim via circumstantial evidence. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355 (*Guz*); *Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 68.) As a result, most employment discrimination claims are analyzed under a three-step framework that allows discrimination to be inferred from facts that create a reasonable likelihood of bias and that are not satisfactorily explained. (*Guz, supra,* 24 Cal.4th at p. 354.)

Illumina specifically asserts that although Czarnik "muddied the water" with extensive testimony about his perceptions that he was treated badly after his breakdown, his subjective beliefs are not sufficient to support an inference of discrimination. Likewise, it argues that its knowledge of Czarnik's disability, standing alone, will not establish the

requisite causation and that, as a matter of law, the 17 month gap between his breakdown and his termination prohibits any inference of causation. We are not persuaded.

Although Czarnik subjectively believed that Illumina initially limited his professional responsibilities and authority and ultimately terminated him as a result of his disability, the evidence was uncontroverted that as a result of Czarnik's breakdown, Stuelpnagel and Chee became concerned about Czarnik's ability to serve as the CSO. There was also evidence (in part based on Czarnik's testimony, but also from other sources) that thereafter Czarnik was excluded from important decision-making regarding the company's research and development efforts relating to its primary focus (genomics), financing, business collaborations and recruiting and that the company failed to recognize his status as a company founder.

Despite Illumina's contention that Czarnik was "failing miserably" in 1998 and 1999 prior to his breakdown, it did not seek to replace Czarnik as the CSO or document his alleged performance problems in his personnel file and there was evidence that as of January 1999 Stuelpnagel was confident that he had "hired the right R&D managers," including Czarnik. There was evidence suggesting that Flatley knew of Czarnik's mental illness and it was uncontroverted that, shortly after Flatley became the CEO, he assigned certain scientific job responsibilities away from Czarnik to others; required Czarnik to report directly to him, even though he had no scientific background; excluded Czarnik from participating in recruiting the new CSO and prospective board members; and after Czarnik declined to leave the company voluntarily, threatened him and later imposed unattainable goals on him. Further, Illumina did not dispute that at about the same time it stopped recognizing Czarnik as a

founder (although it continued to accord such recognition to Stuelpnagel and Chee) in its publications.

In light of this evidence (and in the absence of any argument by Czarnik to the jury that it could find discrimination based solely on Illumina's knowledge that Czarnik suffered from depression), there is no basis for concluding that the jury found discrimination purely based on Illumina's knowledge of Czarnik's mental illness. Additionally, the fact that Illumina did not terminate Czarnik until 17 months after his breakdown is not determinative on the causation issue in light of his argument, and the jury's finding, that Illumina not only terminated his employment, but also took other adverse actions against him during the intervening period, in whole or part because of his disability.

Although Illumina introduced evidence that it had legitimate, nondiscriminatory reasons for limiting Czarnik's participation and responsibility, attempting to repurchase his stock and ultimately terminating him, the jury rejected its explanations as pretextual. We are not at liberty to disregard these findings, which, as discussed above, are supported by substantial evidence.

IV. *Damage Awards*

1. Emotional Distress Damages

A jury has "vast discretion" in determining the amount of damages to be awarded and its determination will not be disturbed on appeal unless the recovery is "so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 64.) Relying on other published employment cases involving smaller emotional distress damage awards, Illumina contends

that the jury's award of $500,000 in emotional distress damages is excessive as a matter of law. However, that the award in this case is larger than those made in similar cases does not provide a basis for overturning the award. (*Watson v. Department of Rehabilitation* (1989) 212 Cal.App.3d 1271, 1294.)

Notably, Illumina does not cite any case invalidating, as a matter of law, an emotional distress damage award similar to the one the jury made here. In any event, in light of other published employment law cases upholding higher emotional distress damage awards, we cannot conclude that the jury's award in this case was excessive as a matter of law. (See *Iwekaogwu v. City of Los Angeles* (1999) 75 Cal.App.4th 803, 821 [award of over $450,000 in emotional distress damages for discrimination based on race and national origin over a period of several years]; *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 997 [award of $662,000 in emotional distress damages resulting from sexual harassment occurring over a 6 month period and subsequent demotion], disapproved on other grounds by *Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 663; *Watson v. Department of Rehabilitation*, *supra*, 212 Cal.App.3d at p. 1294 [award of $1,102,000 in non-economic damages to an employee who suffered a depressive disorder with psychotic features as a result of racial harassment for an 8-year period].) Accordingly, we reject Illumina's argument that the compensatory damage award must be reversed.

2. Punitive Damages

The rationale underlying punitive damages is to punish the wrongdoer and deter similar future wrongful conduct. (*State Farm Mutual Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416 (*State Farm*).) While states have "broad discretion . . . with

respect to the imposition of . . . punitive damages" (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 433 (*Cooper Industries*)), the federal Constitution's due process clause prohibits states from imposing "grossly excessive" punishments (that is, amounts grossly disproportionate to the gravity of the defendant's conduct) on tortfeasors. (*Id.* at p. 434.)

Where, as here, a party challenges the amount of a punitive damage award as violative of the federal due process clause, we review the issue de novo. (*Bardis v. Oates* (2004) 119 Cal.App.4th 1, 18 and cases cited therein.) In determining if a punitive damage award in a particular case is constitutionally excessive, we must conduct a "thorough, independent review" of the award, considering (1) the reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the award and (3) the difference between the award and civil penalties authorized or imposed in comparable cases. (*Textron Financial Corp. v. National Union Fire Ins. Co. of Pittsburgh* (2004) 118 Cal.App.4th 1061, 1081-1082.) The ultimate question is whether the award is "grossly excessive" in relation to the interests the state seeks to protect through the award. (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 558 (*Gore*).)

Illumina contends that the application of the *Gore* factors requires that we strike or limit the jury's punitive damage award. As neither of the parties have discussed the third factor in any significant respect (except for a short discussion in the reply brief, which we decline to consider), we accordingly focus on the first and second factors in determining whether the punitive damage award violates constitutional principles.

A. Reprehensibility

The reprehensibility of the defendant's conduct is the "most important indicium of the reasonableness of a punitive damages award" for due process purposes. (*State Farm, supra,* 538 U.S. at p. 419.) The degree of reprehensibility turns on whether (1) the resulting harm was physical rather than economic; (2) the tortious conduct evinced a reckless disregard of the health or safety of others; (3) the target of the conduct was financially vulnerable; (4) the conduct was repeated rather than an isolated incident; and (5) the harm was the result of intentional malice, trickery or deceit rather than a mere accident. (*Ibid.*)

The application of these factors here supports an award of punitive damages, but not a particularly substantial one. Czarnik's primary harm was economic (i.e., the loss of stock) and the wrongful conduct did not evince a reckless disregard for Czarnik's health or safety. Further, in light of Czarnik's knowledge that Illumina could not force a repurchase of the stock without his consent and his retention of stock having a market value of $9 million even after the repurchase, we cannot characterize Czarnik as financially vulnerable. Although the jury found that Illumina engaged in a pattern of discriminatory and retaliatory behavior, the record does not establish overwhelming support for a finding that the harm resulted from intentional fraud, malice and deceit. The misconduct in question was thus not highly reprehensible.

B. Ratio

Although there is no bright-line maximum ratio of punitive damages to compensatory damages that will comport with due process requirements, the United States Supreme Court has recognized "in practice, few awards exceeding a single-digit ratio . . . to a significant

degree" will pass constitutional muster absent extraordinary circumstances and that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety" in most cases. (*State Farm, supra*, 538 U.S. at p. 425.) It has also advised, however, that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based on the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*Ibid.*)

Here, the ratio of punitive to compensatory damages was 2.28 and thus did not have to be justified by extraordinary circumstances to pass constitutional muster. On the other hand, the $2.2 million compensatory damage award was without question "substantial" and, in light of the fact that Illumina's conduct was not highly reprehensible (as discussed above), we conclude that a 1:1 ratio of punitive to compensatory damages is the maximum award that is sustainable against a due process challenge.

Czarnik suggests that the $5 million punitive damage award is nonetheless justified in light of the evidence that Illumina's net worth at the time of trial exceeded $90 million. However, even if we disregard that the evidence also showed Illumina had no positive earnings during the relevant period, it is nonetheless true that although the use of a defendant's wealth as a factor in assessing punitive damages is not inappropriate, that factor "cannot justify an otherwise unconstitutional punitive damages award." (*State Farm, supra,* 538 U.S. at p. 427.) Thus, even if Illumina's net worth at the time in question was otherwise sufficient under state law to support the amount of the punitive damages awarded, it does not cure the federal constitutional infirmity of the award.

DISPOSITION

The judgment is modified to reduce the punitive damage award to $2,196,935 million and, as so modified, is affirmed, as are the challenged post-trial orders. Each party is to bear its own costs on appeal.

McINTYRE, J.

WE CONCUR:

McCONNELL, P.J.

O'ROURKE, J.